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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-624

RICHARD F. NESTLER, *et al.*,
Petitioners,

v.

EXXON CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	9
APPENDIX	1a

TABLE OF AUTHORITIES

Adickes v. S. H. Kress & Co.,
398 U.S. 144 (1970) 6

Cooper v. Aaron,
358 U.S. 1 (1958) 6

Fortner Enterprises, Inc. v. United States Steel Corp.,
394 U.S. 495 (1969) 6

Ligouri v. New York, N.H. & H.R. Co.,
26 F.R.D. 565 (D.C.Conn. 1961) 8

Page

Norfolk Monument Co. v. Woodlawn Memorial Gardens,
394 U.S. 700 (1969) 6

Poller v. Columbia Broadcasting System, Inc.,
368 U.S. 464 (1962) 5, 8

Robert Stigwood Group, Ltd. v. O'Reilly,
530 F.2d 1096 (2d Cir. 1976) 6

Simler v. Conner,
372 U.S. 221 (1962) 7

Wang v. Lake Maxinhall Estates, Inc.,
531 F.2d 832 (7th Cir. 1976) 6

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Petitioners Richard F. Nestler, Donald B. May, and Nestler-May Company, respectfully pray that a writ of certiorari be granted to review the judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit for which review is sought is captioned Richard F. Nestler, et al., Appeallants, v. Exxon Corporation, Appellee, No. 76-1652,

argued May 5, 1977, decided June 1, 1977, and printed as an appendix to this petition at page 1a.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 1, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the granting of summary judgment in this antitrust case is inconsistent with this Court's opinion in *Poller v. Columbia Broadcasting System, Inc.*, 268 U.S. 464 (1962).

2. Whether denial of petitioner's motion under Rule 39(b) Federal Rules of Civil Procedure, is unconstitutional as applied in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, 28 United States Code:

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of a party.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39. Trial by Jury or by the Court

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Rule 56. Summary Judgment.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is

asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Richard F. Nestler, Donald B. May, and Nestler-May Company, a limited partnership, (hereinafter "Nestler"), appellants below and petitioners in this Court, have alleged that Exxon Corporation ("Exxon"), appellee below, engaged in activity proscribed by the antitrust laws of the United States in that Exxon, together with its affiliates and subsidiary corporations and divisions, induced Nestler to grant to Exxon an exclusive license to Nestler's patent for a nested-bag process, blocked access to nested-bag machinery, and failed to produce bags, thereby destroying the business of Nestler. The appellants also have alleged breach of three contracts between the parties, the patent

licensing agreement, an agency agreement, and a subsidy agreement.

In a memorandum opinion, the district court granted summary judgment for Exxon on both antitrust and contract grounds, notwithstanding plaintiffs' uncontroverted affidavits of fact. The court also refused to grant appellants' motion for a jury trial pursuant to Rule 39(b), F.R.C.P.

In a memorandum opinion (App. 1a), the court of appeals affirmed the district court's order granting summary judgment and therefore found it unnecessary to reach the jury trial question.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S OPINION IN *POLLER V. COLUMBIA BROADCASTING SYSTEM, INC.*, 368 U.S. 464 (1962).

This Court has declared in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), that:

> "(S)ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which has so long been the hallmark of 'even handed justice'." (footnote omitted)

Id. at 473.

This Court has consistently adhered to the rule stated in *Poller*. *See, e.g., Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 704 (1969); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969).

Petitioner herein presented genuine issues of fact which involved questions of motive and intent. As indicated in *Poller*, summary proceedings are wholly inappropriate in such a case. In the instant case the respondent has filed no affidavits to support its motion for summary judgment. Petitioner, on the other hand, filed three uncontroverted affidavits in opposition to respondent's motion for summary judgment. It has consistently been held in the various circuits that facts supported by affidavit must be taken as admitted if they are not opposed by affidavit by the other party. *See, e.g., Wang v. Lake Maxinhall Estates, Inc.*, 531 F2d 832, 835 (7th Cir. 1976); *Robert Stigwood Group, Ltd. v. O'Reilly*, 530 F2d 1096, 1100 (2d Cir. 1076). Indeed, this principle has been affirmed by this Court. *Adickes v. S. H. Kress & Co.*, 394 U.S. 144, 158 (1970).

It is the obligation of all of the federal courts to enforce Article VI of the Constitution which makes it the "supreme law of the land". *Cooper v. Aaron*, 358 U.S. 1 (1958). That principle has always been respected by this Court and its interpretation of the Constitution and the laws pursuant thereto must be taken as the supreme law of the land by the lower federal courts. *Id.* at 18. The trial court and the court of appeals in the instant case have violated their obligations under Article VI and the decisions set forth by this Court. These principles or orderly judicial process must be enforced by this Court.

The decision of the court of appeals, affirming the district court's granting of summary judgment, has so far departed from the accepted and usual course of judicial proceedings mandated by this Court, as to call for an exercise of this Court's power of supervision. This justifies the grant of certiorari to review the judgment below.

2. DENIAL OF PETITIONER'S MOTION UNDER RULE 39(b), F.R.C.P., IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

Rules 38(d) and 39(b) of the Federal Rules of Civil Procedure are unconstitutional as applied by the district court and affirmed by the court of appeals in this case in that they operate to deny petitioner the right to a trial by jury as guaranteed by the Seventh Amendment.

The Seventh Amendment to the United States Constitution is an affirmative guarantee of the right to a jury trial. It is not a negative guarantee which only becomes operative upon demand.

In accord with the Seventh Amendment, Rule 38(a), F.R.C.P., provides "(T)he right to a trial by jury . . . shall be preserved inviolate." It thus embraces the very spirit and intent of the Seventh Amendment which sought to guarantee to Americans forever the right to have important civil disputes determined by a jury of their peers as was the custom at common law.

Rule 38(d), providing that jury trial is waived unless demanded in apt time, flies in the face of the unequivocal language of both the Seventh Amendment and Rule 38(a). The constitutional right to a jury trial under the Seventh Amendment is a fundamental right and "(t)he federal policy favoring jury trials is of historic and continuing strength", *Smiler v. Conner*, 372 U.S. 221, 222 (1962).

Rule 39(b), F.R.C.P., however, provides a safety valve designed to cure the harshness of Rule 38(d) waivers. Notwithstanding the failure of a party to demand a jury trial in an action in which such a demand might have been made, the court may in its discretion and upon motion order a trial by jury of any or all issues, absent some overwhelming reason to the contrary.

In failing to grant petitioner's motion for jury trial the district court has grossly abused its discretion as did the court of appeals in refusing to reach this fundamentally important question. (App. 1a).

The decision of the district court, as affirmed by the court of appeals, has followed a considerable number of decisions which take a very strict view of Rule 38(d) and refuse to relieve a party from the self-executing waiver of jury trial unless there are special circumstances excusing the failure to make a timely demand. One court has even boasted that "(i)t has been the unbending practice of this court for many years not to order a jury trial once it has been waived." *Ligouri v. New York, N.H. & H.R. Co.*, 26 F.R.D. 565, 568 (D.C. Conn. 1961).

It is urged that such decisions have established dangerous precedent and thus put the emphasis in the wrong place. This controversy therefore presents an important constitutional question that has not heretofore been decided, but should be decided by this Court.

This Court has made it abundantly clear that in civil antitrust cases a jury is necessary to determine the inherent questions of fact involving motive and intent. *Poller v. Columbia Broadcasting System, Inc.*, 268 U.S. 464 (1962). Denial of petitioner's motion under Rule 39(b), F.R.C.P., for a jury trial which was made in a timely fashion after

the record was developed to a point where it was evident that the issues involved, motive and intent, could not be resolved on the basis of documentary evidence, renders Rule 38(b) unconstitutional as applied in this case.

Special and important reasons exist for the granting of certiorari in this case because the decision of the court of appeals has sanctioned a departure from the mandates of this Court which operates unconstitutionally to deprive petitioner of his fundamental right to a trial by jury.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

CARL L. SHIPLEY
Counsel for Petitioners

APPENDIX

(Judges Bazelon, Leventhal and Robinson)

MEMORANDUM

Plaintiff contends that the District Court erred in failing to grant the belated application for a jury trial. We need not reach that question because we affirm the District Court's order granting summary judgment and dispensing with trial entirely.

Appellant's counsel vigorously contended at oral argument that the District Court had not fairly granted opportunity for discovery. However, we find that the District Court granted plaintiff ample opportunity for discovery. Exxon's first motion for summary judgment was denied for that reason. In addition to interrogatories and introduction of documents, plaintiffs noticed a series of depositions, but stopped after taking the deposition of John McClintock. When Exxon renewed its motion for summary judgment, both counsel rested on the affidavits, documents and depositions in the court's file.

The contract claims are adequately treated by the District Court, and plaintiff's counsel really rested on the claims under the Sherman Act, with the contract claims serving their purpose, presumably, as background and perhaps as predicate for discovery.

On the antitrust claims, we are mindful of the rule of *Poller** that summary judgment is to be granted only sparingly in antitrust cases, but in this case it was proper.

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* Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

Even in antitrust cases there is a duty to provide some specific indication of what evidence might be adduced at trial as contrasted with generalized accusations. *The Poster Exchange, Inc. v. National Screen Service Corp.*, 542 F.2d 255 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3718 (May 2, 1977).

There is not even a glimmer of a showing of a market that Exxon is either monopolizing or has attempted to monopolize.

The undisputed evidence shows that Exxon entered into a triad of agreements with Nestler, and his company, which would have had the effect of exploiting, to the mutual advantage of the parties and the public, his nested bag invention that would add speed and reduce costs in supermarkets. This included a "subsidy" by Exxon to plaintiff for early production expenses, including payments to Sheldahl, the manufacturer of the machines needed to produce the bags.

Unfortunately, plaintiff's concept, at least in its present form, did not result in commercial success. And that's all the proof shows. There are allegations that at the outset Exxon prevented plaintiff from reaching similar agreements with other companies, but these rest only in speculation and surmise without support in proferred evidence. There is also an assertion that after Exxon tried to cut out of the project in 1971 and came back later in 1971 to fullfill its contract obligations, it was not vigorous enough and limited sales to Kroger and two other chains. This is tied into an allegation of a plan of Exxon to appropriate the concept and its commercial exploitation. Again, there is no proferred evidence beyond sheer speculation, speculation of a kind that obviously runs athwart of the fact

that as soon as it could terminate the project under the contracts, Exxon did so.

This leaves plaintiff with the claim that there was a forbidden conspiracy in restraint of trade in that Exxon precluded plaintiff's having access to Sheldahl, the manufacturer, and hence to the machines necessary for production. As to this, the District Court stressed that the proof showed that when the Exxon contracts were terminated in 1973, plaintiff had the contractual rights to proceed; that it sought and obtained a quotation from Sheldahl; yet never bought a machine. Plaintiff says he was too poor by then, the victim of Exxon's deliberate plan to destroy him rather than let the idea be exploited. This is not inconceivable in theory, but if it is to be a predicate for using the overburdened judicial machinery, it must have support in more than bitterness and suspicion.

It is ironic and revealing that the only specific item that might have provided a wedge for a trial – the October 21, 1971 letter from Mr. McClintock to Nestler-May – was not even included in the appendix filed by plaintiff in this court. Plaintiff has not cited the deposition of Mr. McClintock as pursuing the subject of the letter. And plaintiff did not actually take the deposition that had been noticed from Dr. John McCullough of Exxon, whom Sheldahl identified as the person whose consent was necessary before Sheldahl could supply Nestler-May with the machines.

The fact that Exxon entered into an exclusive agreement with Sheldahl is not of itself evidence of an attempt to exclude Nestler-May from the machines. The fact is that from 1968 to 1971 machines were supplied to Nestler-May from Sheldahl, and indeed were part of the Nestler expenses that Exxon subsidized. The October 1971 Sheldahl letter

did not deny plaintiff a quote, it merely stated that the matter would have to be reviewed by Exxon. It was sent during a relatively short period when there was some uncertainty whether Exxon would continue with the nested-bags venture. There is no indication at that time whether Nestler would have been denied access to Sheldahl by Exxon, if the Nestler-Exxon venture disbanded. Nestler was at that time insisting on continuance of the venture, and later in 1971 Exxon did resume the nested-bag venture under its agreements with Nestler. In 1973 when Exxon no longer had the exclusive license, and Nestler-May was free to manufacture on its own account, it was offered machines by Sheldahl, as duly pointed out by the District Court.

As the case was presented to the District Court by counsel and the plaintiff, the District Court properly granted summary judgment.

Affirmed.